Filed 2/17/05 Russell v. Western Mutual Ins. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHARLES RUSSELL et al., Plaintiffs and Appellants, v. WESTERN MUTUAL INSURANCE COMPANY, Defendant and Respondent.	B169469 (Los Angeles County Super. Ct. No. BC265529)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Wendell Mortimer, Jr., Judge. Affirmed.

Law Offices of Steven L. Zelig and Steven L. Zelig for Plaintiffs and Appellants.

Goodheart and Hartman, Michael R. Goodheart and Gregory J. Goodheart for Defendant and Respondent.

SUMMARY

In a suit against an insurer for breach of contract and breach of the implied covenant of good faith and fair dealing, the insurer brought a motion for summary judgment, asserting it paid full policy limits on the insured's claim arising from the Northridge earthquake. The insured failed to file any evidence in opposition, and the trial court granted summary judgment. The insured contends on appeal that summary judgment was improper because the insurer did not meet its initial burden on summary judgment, in that its evidence did not address the insured's bad faith cause of action. We disagree and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the Northridge earthquake on January 17, 1994, and was filed in the wake of the Legislature's revival of insurance claims arising from the earthquake that would otherwise have been barred by the statute of limitations.[1] (Code Civ. Proc., § 340.9.) In the operative complaint, several plaintiffs brought suit against their insurers, each alleging substantially identical causes of action for breach of contract and for breach of the implied covenant of good faith and fair dealing. In the seventh and eighth causes of action, Charles and Barbara Russell asserted their claims against Western Mutual Insurance Company (Western Mutual or insurer), seeking compensatory (economic and non-economic) damages, punitive damages and attorney fees.

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[1] Code of Civil Procedure section 340.9 provides in part: "[A]ny insurance claim for damages arising out of the Northridge earthquake of 1994 which is barred as of the effective date of this section [January 1, 2001] solely because the applicable statute of limitations has or had expired is hereby revived and a cause of action thereon may be commenced provided that the action is commenced within one year of the effective date of this section." (Code Civ. Proc., § 340.9, subd. (a).) This lawsuit was filed on the last day of the one-year period, January 2, 2002.

In their breach of contract claim, the Russells alleged, among many items, that Western Mutual "delayed payment, did not pay adequate amounts, lowballed, failed to comply with the implied covenant, failed to engage appropriate consultants to assist in the fair and impartial assessment of loss, failed to comply with applicable regulations and statutes, and breached the contract of insurance in various other ways." They alleged that since the revival of their claim, the insurer refused to further adjust the loss and failed to provide documents that would assist the Russells in presenting their case. They further alleged some sixty or more ways in which Western Mutual allegedly breached the implied covenant of good faith and fair dealing, including "[e]ngaging in dilatory claims handling practices . . . ."[2]

On March 27, 2003, Western Mutual brought a motion for summary judgment, asserting three undisputed material facts: (1) the Russells made a claim under an earthquake policy that provided a blanket amount for damages occasioned by earthquake; (2) the blanket amount of coverage totaled $260,000; and (3) the entire blanket amount was paid by December 1, 1994. The insurer submitted a declaration from Steven J. Koep, the claim manager for Western Mutual in charge of all property claims filed since January 17, 1994. Koep stated the insurer had paid the Russells $25,000 for mortgage payment protection coverage[3] and the full $260,000 for damages from the earthquake by December 1, 1994, so that all sums payable had been paid. Koep submitted "true and correct" copies of the declarations page of the Russells' policy, the entire Western Mutual Homeowners Policy, and the insurer's record of payments on the Russells' claim.

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[2] The Russells' claims, like those of the other plaintiffs, included allegations such as misrepresenting the statute of limitations, misapplying deductibles, fabricating causation arguments to attribute earthquake damage to other uncovered causes, canceling policies vindictively, invading the insureds' relationships with counsel, discouraging legitimate claims, ignoring insurance regulations, compelling plaintiffs to institute litigation and so on.

[3] The Russells' policy contained a mortgage payment protection endorsement which provided a maximum benefit of $25,000.

The last item showed payments to the Russells of various amounts totaling $285,000, with payments beginning in February 1994 and ending with final payments of $160,446.76 on December 1, 1994.

The Russells failed to file any opposition papers until the day before the hearing. The trial court entertained arguments at the June 13, 2003 hearing, took the matter under submission, and issued a ruling later that day granting the insurer's motion for summary judgment. The court observed that:

- The summary judgment motion was filed more than 75 days before the motion was to be heard, and the Russells filed nothing in response until a few hours before the hearing. No timely application to continue the motion was made under Code of Civil Procedure section 437c, subdivision (h).[4]
- The insurer's moving papers were sufficient to support a granting of the motion. Policy limits were paid in 1994, and the Russells submitted no admissible evidence of bad faith during the course of those payments.
- The late opposition filed by the Russells' attorney the day before the hearing contained an unsigned declaration and an unsigned letter as exhibits. On the morning of the hearing, the Russells filed another declaration which contained a copy of Charles Russell's signature.[5] "Despite the untimely and defective

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[4] The Russells' attorney filed, the day before the hearing, an ex parte application to continue the hearing to allow the filing of an opposition. In a declaration he "request[ed] CCP § 473 relief," and explained he was "the subject of an extraordinary level of press of business . . . ."

[5] Charles Russell's declaration stated that:

- The Russells received a disclosure form showing they elected a form of guaranteed replacement cost coverage in their homeowners policy, and the disclosure did not state that the replacement cost feature did not apply to their earthquake coverage. Russell believed the replacement cost feature obviated the limits on earthquake coverage.
- Russell sent a letter to Western Mutual "which accurately references some of my concerns about their conduct. As far as I was concerned the adjustment of

exhibits," the court "considered the merits of [the Russells'] objections to the declaration of [the insurer's] claims manager, Steven Koep." (The Russells objected on the basis that Koep's declaration did not show he had "any specific personal knowledge whatsoever of what, why and/or how Western Mutual paid Charles and Barbara Russell anything, or the reasons therefore [*sic*]."). The trial court overruled the objections, finding Koep's declaration sufficient to establish he had knowledge the policy limits were paid and there was nothing due under the policy.

> my claim was substantially delayed. I am aware of no reasons whatsoever why the claim should have taken eleven months to complete. As far as I was concerned, the carrier did not timely pay amounts not reasonably in dispute under the policy. As far as I am concerned, had I not been assertive with Western Mutual, they would have been even slower. As far as I am concerned, I was required to spend an inordinate amount of time 'policing' the insurer."

Attached to Russell's declaration was an unsigned letter from him to Western Mutual dated November 11, 1994, asserting that negligent actions of the insurer's employees had dramatically increased the Russells' damages. The letter asserted a number of "detrimental actions" by Western Mutual, including assertions that:

- The insurer had sufficient documentation that the Russells had a policy limit claim by March 1994 to have made a reasonable policy limit settlement at that time;
- A former employee of Western Mutual was negligent in failing to reach a settlement in a timely manner, and made an "outrageous offer" of $51,456 on June 23, 1994, evidencing bad faith, and compelling the Russells to seek assistance from an independent adjuster whose fee would be 10% of the final settlement; and
- The insurer's actions had both delayed the return to, and significantly increased the cost of repair of, the Russells' home, with damages caused by the insurer amounting to approximately $50,000, plus additional living expenses after February 1995. The letter concluded that the Russells were fully prepared to litigate the matter if their reasonable requests were not met.

On July 2, 2003, the Russells filed a motion for reconsideration of the court's summary judgment ruling, "and/or" for relief under Code of Civil Procedure section 473.[6] Accompanying the motion were an expanded affidavit from Charles Russell and a declaration from an expert in insurance claims adjustment, Richard Masters. Masters opined that there was no good reason for Western Mutual's "extended adjustment" in this case; most earthquake claims could have been settled within three to four months after the loss; Western Mutual unreasonably withheld benefits, violated industry standards and was "guilty of bad faith"; the policy was ambiguous; and the insurer's position that guaranteed replacement costs did not extend to peril caused by earthquake "was unreasonable and in bad faith."

The trial court denied the motion, and this appeal followed.

DISCUSSION

The Russells contend that the evidence Western Mutual presented with its summary judgment motion did not entitle the insurer to judgment. They present two bases for their argument that the insurer "did not [meet] its initial burden" on summary judgment. Both are mistaken.

First, the Russells argue the insurer's evidence did not negate the cause of action for breach of the implied covenant of good faith and fair dealing. They contend the insurer's evidence showed a "delay of eleven months in paying [the] claim," and it was the moving party's "burden to prove that the protracted delay of eleven months was reasonable," or "to prove that it did not unreasonably withhold during this period." Since Western Mutual "[chose] to ignore" this issue, its motion for summary judgment should have been denied as a matter of law. This analysis misstates the law applicable to summary judgment motions.

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[6] The motion papers included a declaration from Steven L. Zelig, stating only that he was the Russells' counsel and that, with regard to late and/or incomplete documents submitted in opposition to the insurer's motion for summary judgment, "I request relief pursuant to C.C.P. Section 473."

Western Mutual, as the party moving for summary judgment, "bears the burden of persuasion that there is no triable issue of material fact and that [it] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) A triable issue exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Ibid*., fn. omitted.) Western Mutual "bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if [it] carries [its] burden of production, [it] causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*)

In this case, the insurer's evidence showed it paid its full policy limits over the course of ten and one-half months after the filing of the claim on January 19, 1994, with payments beginning in February 1994 and ending with the final payment of $160,446.76 on December 1, 1994. This was sufficient to constitute "a prima facie showing of the nonexistence of any triable issue of material fact" (*Aguilar, supra*, 25 Cal.4th at p. 850), both as to breach of contract and breach of the implied covenant of good faith and fair dealing.[7] The insurer showed both full payment under the insurance contract and exactly when it made each of the payments. Nothing in that evidence would permit a trier of fact to find the insurer acted in bad faith. The mere fact that eleven months elapsed before the

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[7] Cf. *Chateau Chamberay Homeowners Assn. v. Associated International Ins. Co.* (2001) 90 Cal.App.4th 335, 346, quoting *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1395 [allegations asserting a claim for breach of the implied covenant of good faith and fair dealing "'must show that the conduct of the defendant, whether or not it also constitutes a breach of a consensual contract term, demonstrates a failure or refusal to discharge contractual responsibilities, prompted not by an honest mistake, bad judgment or negligence but rather by a conscious and deliberate act, which unfairly frustrates the agreed common purposes and disappoints the reasonable expectations of the other party thereby depriving that party of the benefits of the agreement'"].

final payments does not raise a triable issue of fact as to bad faith, or even that the "delay" was caused by the insurer.

The Russells insist Western Mutual had the "burden to prove that the protracted delay of eleven months was reasonable." This misstates the moving party's burden. Its burden is to "*persuade* the court that there is no material fact for a reasonable trier of fact to find, and not *prove* any such fact to the satisfaction of the court . . . ." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. 11.) Further, summary judgment does not require a defendant to "conclusively negate" the plaintiff's cause of action. (*Id.* at p. 853.) The defendant must merely show the plaintiff cannot establish one or more elements of his cause of action. (*Id.* at pp. 853, 854 ["'[g]iven the difficulty of proving a negative, . . . a test' requiring conclusive negation 'is often impossibly high'"], quoting *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 373, conc. opn. of Chin, J.) The insurer met its initial burden of persuasion when it presented its payment evidence, showing full payment of policy benefits and the dates and amounts of the payments, all of which was prima facie reasonable conduct. Consequently, the Russells were required to produce some evidence that the insurer's conduct was unreasonable, in order to create a triable issue of fact.[8] "The plaintiff . . . may not rely upon the mere allegations . . . of its pleadings to show that a triable issue of material fact exists but, instead [must] set forth the specific facts

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[8] The Russells argue that summary judgment was appropriate only if "an eleven month delay cannot constitute unreasonable delay as a matter of law . . . ." We disagree. First, the term "eleven month delay" is the Russells' characterization, but they produced no evidence that the time period in question should be so characterized. Of course there are circumstances under which an insurer's failure to act on a claim for eleven months could amount to unreasonable, bad faith conduct. (See *Fleming v. Safeco Ins. Co.* (1984) 160 Cal.App.3d 31, 36-37 [upholding jury finding of bad faith, based on conflicting evidence of the cause of delay in resolving plaintiff's uninsured motorist claim a year and a half after the accident; evidence indicated Safeco was not pursuing the adjustment of the claim with any degree of diligence; some seven months elapsed from the date of the accident before Safeco even concluded from its investigation that vehicles involved were uninsured].) However, the mere fact that eleven months passed before final payment on a claim does not, in itself, create a triable issue of fact as to unreasonable conduct.

showing that a triable issue of material fact exists . . . ." (Code Civ. Proc., § 437c, subd. (p)(2).) The Russells, however, submitted no timely opposition evidence. Entry of summary judgment was therefore appropriate.

Second, the Russells argue the contract of insurance was ambiguous. They say the policy's guaranteed replacement cost endorsement applied to losses resulting from earthquake, and consequently Western Mutual did not pay the Russells all that it was obligated to pay. We see no ambiguity in the provisions of the policy, which are these:

- The policy's earthquake endorsement states that:

> "In consideration of the additional premium shown in the Declarations, 'earthquake', 'volcanic eruption', and 'tectonic plate movement' are included as covered causes of loss under Coverages A [dwelling], B [other structures], C [personal property] and D [loss of use]. The amount of coverage shown in the Declarations for Earthquake is a blanket amount of coverage applying to Coverages A, B, C and D. The maximum amount payable for any one loss is the blanket amount shown in the Declarations for earthquake."

- The declarations page shows the limit for earthquake coverage was $260,000.
- The "Guaranteed Replacement Cost Endorsement" states, in bold type under its heading, "**(Building Structures Only/Earthquake Excluded)**". Its first paragraph states that:

> "In consideration of the premium charged for this policy and subject to the following conditions the Company guarantees to pay the full cost of replacement of the dwelling and/or appurtenant private structures if the property is destroyed or damaged beyond repair by a peril insured against under this policy and during the term of this policy. This endorsement shall not apply to loss or damage from earthquake, volcanic eruption or tectonic plate movement."

We discern no ground for concluding these terms are ambiguous. The Russells complain the declarations page does not show that the guaranteed replacement cost endorsement is not applicable to the peril of earthquake, and that a "California Residential Property Insurance Disclosure" it received from the insurer showing its purchase of the replacement cost endorsement did not state that it did not apply to

earthquake coverage. These complaints are not sufficient to create an ambiguity in the policy.[9] The declarations page cannot conceivably contain an explanation of every policy provision, and the disclosure form expressly stated in its first paragraph that it was not part of the policy, and that "[r]egardless of which type of coverage you purchase, your policy may exclude or limit certain risks. [¶] READ YOUR POLICY CAREFULLY." In short, there is no basis for an ambiguity claim.

Because the insurer's moving papers were sufficient to support summary judgment in its favor, and the Russells filed no opposition, the trial court did not err in granting summary judgment.[10]

DISPOSITION

The judgment is affirmed. Western Mutual Insurance Company is entitled to its costs on appeal.

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BOLAND, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.

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[9] The Russells cite *Adler v. Western Home Ins. Co.* (C.D.Cal. 1995) 878 F.Supp. 1329, which found an ambiguity arising from internal contradictions resulting from language in a "blanket protection plus" endorsement and in the earthquake endorsement. (*Id.* at p. 1333.) *Adler* does not assist the Russells because the endorsement in *Adler*, while making some specific exclusions, did not specifically exclude earthquake coverage. (*Id.* at p. 1334.) The replacement cost provision in the Russells' policy does so explicitly.

[10] The Russells assert the trial court abused its discretion in denying their request for a continuance the day before the summary judgment hearing. However, they offer no cogent rationale to support this contention, and we therefore conclude it is without merit.